



Arizona Utility
Investors Association

2100 N. Central, Ste. 210
P.O. Box 34805
Phoenix, AZ 85067

Tel: (602) 257-9200
Fax: (602) 254-4300

Email: info@auia.org
Web Site: www.auia.org



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BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

WILLIAM A. MUNDELL
CHAIRMAN
JAMES M. IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

2002 APR 12 P 4: 25

AZ CORP COMMISSION
DOCUMENT CONTROL

IN THE MATTER OF THE APPLICATION OF THE)
ARIZONA ELECTRIC DIVISION OF CITIZENS COM-) DOCKET NO.
MUNICATIONS COMPANY TO CHANGE THE CUR-) E-01032C-00-0751
RENT PURCHASED POWER AND FUEL ADJUSTMENT)
CLAUSE RATE, TO ESTABLISH A NEW PURCHASED)
POWER AND FUEL ADJUSTMENT CLAUSE BANK,)
AND TO REQUEST APPROVED GUIDELINES FOR THE)
RECOVERY OF COSTS INCURRED IN CONNECTION)
WITH ENERGY RISK MANAGEMENT ALTERNATIVES.)

Arizona Corporation Commission

DOCKETED

APR 12 2002

DOCKETED BY *me*

**AUIA'S RESPONSE TO
MOHAVE AND SANTA CRUZ COUNTIES'
MOTION FOR SUMMARY JUDGMENT**

On April 5, 2002, Mohave and Santa Cruz counties (the "Counties"), filed a motion requesting that the Arizona Corporation Commission ("Commission") enter certain findings of fact in the above-captioned matter or, in the alternative, stay the proceedings.

The Arizona Utility Investors Association ("AUIA") respectfully requests the Commission to deny the Counties' motion in its entirety for the following reasons:

I. The Findings of Fact Deny Due Process

No matter how it is framed, the Counties' request for findings of fact is nothing more than a motion for summary judgment which would deny the Applicant ("Citizens") its right to a hearing in this matter and would constitute a blatant denial of due process of law.

The Counties ask the Commission to make the determinations that 1) Citizens has not established that its purchased power costs were prudently incurred and 2) that its waiver of the attorney-client privilege in pre-filed testimony was imprudent and contrary to the public interest.

1 Based on these findings, the Commission is asked to conclude that
2 Citizens cannot recover its purchased power costs from ratepayers.

3 We are constrained to point out that the proposed findings involve the
4 central issues in the case, to be decided after a full presentation of the evidence.
5 The Counties ask the Commission to make these findings where there is no
6 record. No witnesses have been examined. No testimony or exhibits have been
7 admitted into evidence. There is no transcript, no recommended order.

8 The statutes cited by the Counties (A.R.S. §40-202 and §40-203) convey no
9 authority for the Commission to bypass procedural safeguards and seal the
10 Applicant's fate in a Star Chamber proceeding.

11 The Counties may *say* that the prudence of the power purchase has not
12 been established and they may *say* that the lawyer-client privilege should not
13 have been waived, but what they *say* is not dispositive. The Commission may
14 reach those determinations –albeit erroneously – but they can only flow from a
15 rigorous examination of the evidence conducted with procedural due process.

16 **II. The Commission Cannot Grant the Alternative**

17 The Counties' alternative for a stay until the Applicant "resolves the
18 purchase power dispute" is equally egregious and a legally deficient remedy.

19 We have no clue what "resolves" the alleged purchased power dispute.
20 We can only assume that the Counties expect the Commission to require a
21 litigated result as a pre-condition to obtaining rate relief or even to presenting its
22 case. We disagree strongly that the Commission has that authority.

23 The Commission may *believe* that litigation should have taken place; it
24 may *wish* that it had; but it can't tell a public service corporation ("PSC") that it
25 can't seek a lawful change in its rates and tariffs until the PSC has sued
26 somebody in another venue. Moreover, how would the Commission frame such
27 a requirement?

- 28 • Would it define an acceptable outcome to the litigation?
- 29 • Would that outcome assure Citizens of some level of recovery?
- 30 • Would the Commission examine the pleadings and the transcript of the
- 31 litigation for assurance that it was handled competently?
- 32 • Would the litigation requirement include all possible appeals?

1 • If a settlement were offered, would the Commission want to approve it?
2 The potential consequences of such a policy are absurd, but that is where the
3 Counties' alternative leads.

4 Further, it assumes a fact that is clearly in doubt: namely, that there was
5 and is a continuing issue about overcharging between Citizens and Arizona
6 Public Service Company (APS) that is capable of resolution through litigation.

7 The truth is that there is no evidence of overcharging in this docket. The
8 only indication of it is that Citizens *said so* in unsworn comments in 2000. There
9 is ample evidence that Citizens and APS had *a difference of opinion* over the
10 contract language and its application, but the evidence also is that Citizens
11 became convinced that its chances of winning that argument were poor and that
12 it was more urgent to stop hemorrhaging its customers' cash by negotiating a
13 new contract. In that process, the difference of opinion evaporated.

14 Apparently, it is comforting for some parties to believe that the original
15 dispute can be brought to life in litigation, like the Ghost of Sleepy Hollow, but
16 the fact is that the dispute no longer exists, if it ever did.

17 **III. The Attorney-Client Privilege Is Exaggerated**

18 The Counties appear to claim that by waiving the attorney-client privilege
19 in presenting Mr. Flynn as a witness, Citizens has undermined the public interest
20 in this matter. Indeed, they are pandering to concerns expressed by Chairman
21 Mundell as evidenced by their inclusion of a portion of the transcript from the
22 April 1 oral arguments.

23 AUIA contends that the importance of the lawyer-client privilege in this
24 instance is exaggerated. In addition, the Counties fail to recognize that Citizens
25 was forced into this position by Commission Staff and the Residential Utility
26 Consumers Office ("RUCO").

27 In data requests, Staff and RUCO beat the drum incessantly for proof that
28 Citizens had explored legal and other remedies in its contract dispute with APS.
29 Citizens' witness, Sean Breen, responded that the company had relied on
30 competent legal advice in reaching its decisions. However, it was clear from
31 their continuing data requests and rebuttal testimony that Staff and RUCO were
32 having none of it.

1 In the end, their witnesses asserted that Citizens' failure to litigate at the
2 Federal Energy Regulatory Commission ("FERC") was *prima facie* evidence of
3 imprudent behavior and they urged the Commission to deny recovery unless
4 and until Citizens litigates the "old" contract issues with APS.

5 The Applicant has a right to defend itself from these charges and
6 draconian recommendations, but it is impossible to prove a negative. There is
7 literally no way for Citizens to show the prudence of its decision not to litigate
8 without exposing the intellectual process that led to that decision. That requires
9 waiving the attorney-client privilege, which cannot be done selectively.

10 Furthermore, the relevant testimony and evidence go directly to the issue
11 of whether it is prudent today to embark on a litigation strategy. The evidence
12 shows that it makes no more sense to pursue litigation today than it did in 2000
13 or 2001. We suspect that is the real reason that the Counties are displeased with
14 this material.

15 The waiver of the privilege has changed none of the facts in this case: the
16 language of the "old" contract is still the same and Citizens' odds of prevailing in
17 litigation are no better or worse than they were in 2001. AUIA submits that the
18 Counties' concern over the attorney-client privilege is overstated and largely
19 irrelevant.

20 **IV. Conclusion**

21 The Applicant deserves to have its case heard and judged on the evidence.
22 To grant the Counties' motion would deprive Citizens of due process. The
23 Commission should deny the motion in its entirety.

24
25 RESPECTFULLY SUBMITTED, this 12th day of April, 2002.
26

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28 
29 _____
30 WALTER W. MEEK, PRESIDENT
31
32

1 CERTIFICATE OF SERVICE

2
3 Original and ten (10) copies of the
4 foregoing memorandum were filed
5 this 12th day of April, 2002, with:

6
7 Docket Control
8 Arizona Corporation Commission
9 1200 W. Washington Street
10 Phoenix, AZ 85007

11
12 Copies of the foregoing memorandum
13 were hand-delivered this 12th day of
14 April, 2002, to:

15
16 Chairman William Mundell
17 Commissioner Jim Irvin
18 Commission Marc Spitzer
19 Christopher Kempsey, Esq., Legal Division
20 Ernest Johnson, Esq., Utilities Division
21 Dwight Nodes, Esq., Hearing Division
22 Arizona Corporation Commission
23 1200 W. Washington
24 Phoenix, AZ 85007

25
26 Copies of the foregoing memorandum
27 Were mailed this 12th day of April, 2002,
28 to the following parties of record:

29
30 Michael M. Grant, Esq.
31 Gallagher & Kennedy
32 2575 E. Camelback Road
33 Phoenix, AZ 85016-9225

34
35 Christine L. Nelson, Esq.
36 Deputy County Attorney
37 P.O. Box 7000
38 Kingman, AZ 86402

39
40 Raymond S. Heyman, Esq.
41 Roshka Heyman & DeWulf
42 400 E. Van Buren, Suite 800
43 Phoenix, AZ 85004

44
45 Tom Ferry
46 Citizens Communications Co.
47 P.O. Box 3099
48 Kingman, AZ 86402

Daniel W. Pozefsky, Esq.
RUCO
2838 N. Central Ave., Suite 1200
Phoenix, AZ 85004

Holly J. Hawn, Esq.
Deputy County Attorney
2150 N. Congress Drive, Ste. 201
Nogales, AZ 85621

Carl Dabelstein
Citizens Communications Co.
2901 N. Central Ave., Suite 1660
Phoenix, AZ 85012

Joseph L. Machado
City Attorney
777 N. Grand Avenue
Nogales, AZ 85621

1 Marshall and Lucy Magruder
2 P.O. Box 1267
3 Tubac, AZ 85646-1267

4

5

6

7

8


Walter W. Meek